Feb 27 1876

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 834.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

JAMES P. CUMMING, EDWARD HOWAT, ALEXANDER RHIND, AND EDWARD W. FISKE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 8, 1875.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between James P. Cumming, Edward Howat, Alexander Rhind, and Edward W. Fiske, plaintiffs, and Chester A. Arthur, defendant, a manifest error hath happened, to the great damage of the said Chester A. Arthur, as is said, and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do you command, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the third Monday of the October, term of 1875, that the record and proceedings a foresaid being inspected the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this ninth day of October, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed.
October 9, 1875.
Filed Oct. 9, 1875.

SAML. BLATCHFORD.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit by virtue of the foregoing writ of error, and in obedience thereto,
3 do hereby certify that the following pages, numbered from one to, 30, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Chester A. Arthur, plaintiff in error, and James P. Cumming, Edward Howat, Alexander Rhind, and Edward W. Fiske, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this third day of November, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the said United States the one hundredth.

KENNETH G. WHITE,
Clerk.

4 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court-buildings, in the city of New York, of the term of April, 1873, to wit, of the 13th day of June, in the year of our Lord one thousand eight hundred and seventy-three.

Witness the honorable Lewis B. Woodruff, one of the judges of the said circuit court.

KENNETH G. WHITE,
Clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 10th day of June, 1873, in April term of that year, before the judges of the circuit court of the United States of America for the southern district of
5 New York, in the second circuit, at the United States court-buildings, in the city of New York, came James P. Cumming, Edward Howat, Alexander Rhind, and Edward W. Fiske, by George S. Sedgwick, their attorney, and brought into the said court, before the aforesaid judges thereof then there, their certain declaration against Chester A. Arthur, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

6 U. S. circuit court.

JAMES P. CUMMING ET ALS.
vs.
CHESTER A. ARTHUR, COLLECTOR, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs, doing business in the city of New York, under the firm-name and style of Cumming, Howat & Rhind, and by George S. Sedgwick, their attorney, suggest, and give the court now here to understand and be informed, that heretofore, to wit, on the 24th day of April, last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs, against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said
7 superior court. That the defendant afterwards, by his attorney, duly appeared in said action, and such proceedings were thereupon had; that afterwards, and on the 21st day of May, in the year of our Lord one thousand eight hundred and seventy-three, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided, and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorney aforesaid, com-
8 plain of the defendant herein in a plea of trespass on the case:

For that whereas the said defendant, on the 24th day of April, one thousand eight hundred and seventy-three, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of five thousand dollars lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance of said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well & truly to pay unto the said plaintiffs the said sum of
9 money in this count mentioned when the defendant should be thereunto afterwards requested. And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and, upon such accounting, the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of five thousand dollars of lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiffs, the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the
10 said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, although often requested, &c., has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs, the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of five thousand dollars, and thereof the plaintiffs bring suit, &c.

11 United States circuit court, southern district of New York.

CHESTER A. ARTHUR *ads.* JAMES P. CUMMING & AL. } Plea.

And the said defendant, Chester A. Arthur, by George Bliss, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant; and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

12 Therefore the issue above joined is ordered by the said circuit court to be tried at the court appointed to be held at the U. S. court-buildings, 41 Chambers street, in the city of New York, and in the district and circuit aforesaid, on the third Monday of October, 1874.

A day is given to the parties aforesaid, before the judges aforesaid,

at the U. S. court-buildings, in the city of New York, on the third Monday of October, 1874.

And now, at this day, to wit, on the third Monday of October, in the year of our Lord one thousand eight hundred and seventy-four, before the said judges of the said circuit court, at the U. S. court-buildings, in the city of New York, come the said plaintiffs by their attorney aforesaid, and Nathaniel Shipman, esquire, district judge of the United States for the district of Connecticut, in the second circuit, before whom the said issue was tried, hath sent hither his record had before him, in these words: Afterwards, that is to say, on the day and at the
13 place within contained, before Nathaniel Shipman, esquire, district judge of the United States for the district of Connecticut, in the second circuit within named, according to the form of the statute in such case made and provided, come as well the within-named plaintiffs, by George S. Sedgwick, their attorney, as the within-named defendant, by his attorney, George Bliss, *his attorney*, and the jurors of the jury summoned to try the said issue, being called, also come, who to speak the truth of the matters within contained, being chosen, tried, and sworn, say upon their oath that the said defendant did undertake and promise in manner and form as the said plaintiffs have within complained against him. And they assess the damages of the said plaintiffs by reason of the premises over and above their costs, and charges by them about their suit, in this behalf expended, to six hundred and seventy-six dol-
14 lars and ten cents, in gold coin, as principal, and seventy-six dollars and ninety-four cents, in currency, as interest, and for their costs and charges to six cents.

Therefore it is considered that the said plaintiffs do recover against the said defendant their said damages, costs, and charges by the jurors aforesaid, in form aforesaid assessed, and also ninety dollars and fifty-eight cents for their said costs and charges by the said court now here adjudged of increase to the said plaintiffs, and with their assent, which said damages, costs, and charges in the whole amount to six hundred and seventy-six dollars and ten cents, in gold coin, and one hundred and sixty-seven dollars and fifty-two cents, in currency.

Judgment signed this 9th day of October, 1875.

R. E. STILWELL,
Dep. Clerk.

(Indorsed:) U. S. circuit court. James P. Cumming vs. Chester A. Arthur. Judgment-record. Geo. S. Sedgwick, plffs'. atty. Filed Oct. 9, 1875.

15 United States circuit court for the southern district of New York.

JAMES P. CUMMINGS, EDWARD HOWARD, ALEXander Rhind, and Edwards W. Fiske,
vs.
CHESTER A. ARTHUR.
} Bill of exceptions.

This case, coming on for trial before Hon. Nathaniel Shipman and a jury on the 10th day of December, 1874, at the October term of the United States circuit court for the southern district of New York, the following proceedings occurred upon said day and succeeding days:

Plaintiffs called witnesses showing the importation of certain goods into the port of New York, entered at the custom-house, New York, December 10th, 1872, upon which a duty was exacted at forty per cent.

ad valorem, as "oil-cloth foundations," under section 4, act of June 6th, 1872, and upon which exaction the plaintiffs protested by a protest in form as follows:

16 NEW YORK, *Jan'y 10th*, 1873.

To C. A. ARTHUR, Esq.,
Collector:

SIR: We hereby protest against the liquidation of our duty-paid entry ex "India," from Glasgow, arrived 11th December, 1872, claiming that the goods described therein are only subject to a duty of 30 % as burlaps, under act of June, 1872, section 4, article 725, as burlaps and like manufactures of flax, jute, etc.

We pay the additional duty demanded under compulsion in order to retain possession of our goods, holding you and the Government responsible for the return of the excess illegally exacted.

CUMMINGS, HOWAT & RHIND.

From the decision of the collector as to the rate of duty upon said importations, the plaintiffs duly appealed to the Secretary of the Treasury, who decided on said appeal, and affirmed the liquidation of the collector; whereupon, in due season, plaintiffs brought this action. Plaintiffs also made several other importations by different steamers, and about the same time, namely, the vessels hereinafter named,
17 of which importations there were separate invoices and entries and protests. The following is an extract from so much of said invoices produced in evidence as related to the packages upon which the alleged excess of duty in controversy was exacted as per classifications stated, including also other goods of a somewhat similar nature.

The character, } seen in the following extracts from invoices was made by the appraiser; also, the words "oil-cloth foundations, 40 %;" "jute, under 35 %;" "flax, under 30–35 %;" "dsk. flax, under 30–30 %;" "burlaps, 30 %, which are written after } were written by and on memoranda of classifications made by the appraisers and not by the importers.

Extract of invoice per S. S. "India."

DECEMBER 11TH, 1872.

◇	Ps.		Cwt. qr. lb.	Yards.		£ s. p.	
229	12	76 in., 10¼ burlaps, ordinary finish	14 0 1	1,235	6⅔	32 16 1	Oil-cloth foundations, 40 %.
230	12	" " " "	14 2 10	1,244	.....	33 10	
231	12	" " " "	14 1 3	1,227	.....	32 11 10	
232	12	" " " "	14 2 8	1,255	6⅓	33 19 10	
233	12	" " " "	14 3 17	1,258	.....	34 1 4	

Approved.

WM. A. DARLING, *Appraiser.*

18 *Extract of invoice per S. S. "Anglia."*

OCTOBER 21*st*, 1872.

①	*Ps.*		*Cwt qr. lbs.*				
130	12	76 in., No. 8, burlaps.....	13 3 21	1,235	6½	31 10 4	
131	12	" " " "	14 1 0	1,230	.....	31 7 9	
132	12	" " " "	13 3 24	1,235	.....	31 10 5	
㉛							
134	12	" " 10, "	15 0 14	1,239	5 9½-12	30 7 8	
135	12	" " " "	15 0 0	1,227	.....	29 12 1	
136	12	" " " "	14 3 10	1,253	.....	30 4 10	Oil-cloth foundations, 40 %.
153	12	" " 10½, "	15 3 26	1,256	6	31 8 ..	
154	12	" " " "	16 0 10	1,264	.....	31 12 ..	
155	12	" " " "	16 0 0	1,250	.....	31 5 ..	
156	12	" " " "	16 0 4	1,251	.....	31 5 6	
157	11	" " " "	13 3 20	1,102	.....	27 14 ..	
164	10	40 in " "	13 2 6	2,187	3 2-12	28 17 2	
165	10	" " " "	13 1 26	2,190	.....	27 17 11	
166	10	" " " "	13 2 0	2,187	.....	28 17 1	
㉟							
198	14	76 in., D fine, "	17 3 0	1,469	6½	39 .. 5	
199	14	" " " "	17 2 14	1,476	.....	39 4 1	
200	14	" " " "	17 3 14	1,475	.....	39 3 7	Oil-cloth foundations, 40 %.
201	14	" " " "	17 2 0	1,463	.....	38 17 3	
202	14	" " " "	17 3 10	1,476	.....	39 4 2	

Approved.

WM. A. DARLING,
Appraiser.

19 *Invoice of 35 packages linens forwarded to Glasgow for shipment per S. S. "Columbia," on account and risk of Messrs. Cumming, Howat & Rhind, New York.*

	Ps.		Cwt. qr. lb.	Yards.			
◇3							
½401	52	No. 22, 20 in. Telissier canvas ...	6 3 0	2,080	3	26	
402	56	" " " " " ...	7 1 0	2,233	.....	27 18 3	
403	56	" 27, 24 in. " " ...	9 0 16	2,240	4¼	38 10	
404	54	" " " " " ...	8 3 14	2,160	.....	37 2 6	
405	60	" " 20 in. " " ...	7 3 20	2,400	3⅛	33 15	
406	48	" 30 H. 20 in. cream padding ...	5 3 8	1,920	3⅛	31	
			45 3 2	P. packing.		2 5	
◇1							196 10 9
½120	10	93 in., No. 8, burlaps	13 2 14	1,016½	7½	33 7 1	
121	12	76 in., " "	14 1 2	1,237⅛	6¼	31 11 8	
122	12	" " " "	13 3 18	1,234	.....	31 9 10	
123	12	" " " "	13 3 13	1,231	.....	31 8 4	
124	12	" " " "	13 3 26	1,238	.....	31 11 11	
125	12	" " " "	13 3 9	1,239	.....	31 12 4	
126	12	" " " "	14 0 7	1,238	.....	31 11 11	
127	12	" " " "	14 0 14	1,230	.....	31 7 10	
128	12	" " " "	13 3 18	1,238	.....	31 11 11	
129	12	" " " "	13 3 16	1,237	.....	31 11 4	
			139 1 35	P. packing.		6 7 2	
◇7							323 11 4
		(Inland carriage paid to Glasgow)	.....	.....	.....	.....	
½ 67	96	17½ in. W. loom twill, red & blue edgs., No. 9.		2,899½	3⅜	43 15 9	
20 68	8–10	53 x 62 in. W. B. linen cloth, sprig-spot, No. 7.		48 doz.....	15–8	37 12	
69	"	53 x 62 in. W. B. linen cloth, sprig-spot. No. 9.		48 "	17–6	42	
70	9–11	60 x 68 in. W. B. linen cloth, sprig-spot, No. 9.		36 "	21–9	39 3	
71	"	60 x 68 in. W. B. linen cloth, sprig-spot, No. 13.		33 "	26–5	43 11 9	
72	8–4	54 x 54 in. loom dam'k, sprig centred, 13.	10 doze..		21–10	£10 18 4	.....
	8–10	54 x 60 in. loom dam'k, sprig centred, 13.	4 " ..		24–5	4 17 8	.....
◇2		60 in. loom dam'k, sprig stripe, 13	223½ y'ds 1 case, &		16½ P. packing	15 2 4	30 18 4 2 3 6
							239 4 4
½202	24	40 in. 10 st. fr'd burlaps	13 2 27	2,437	3 1–16	31 1 11	
203	24	" " " "	13 3 2	2,441	.....	31 3	
204	24	" " " "	13 3 3	2,445	.....	31 4	
205	24	" " " "	13 2 18	2,422	.....	30 18 1	
206	24	" " 10½ "	14 2 13	2,451	3 3–16	32 11 1	
◇57			69 2 7	P. packing	.....	1 5	
							158 3 1
½6	12	40 in. 10 burlaps	14 0 0	2,407	3 1–28	30 10 1	
7	12	" " " "	13 3 18	2,407	.....	30 10 1	
8	12	" " " "	13 3 24	2,411	.....	30 11 1	
9	12	" " " "	13 3 26	2,417	.....	30 12 8	
10	12	" " " "	13 2 10	2,419	.....	30 13 1	
			69 1 22	P. packing	.....	2 4 8	
							155 1 8
							1,158 9 6

Excep.
◇6
◇5 405 67
◇3 =405 10
◇7 =67
◇57 =10

Dist. 3%	34 15 1
Oct. 11, '72. B. F. Wyman, D. C	1,123 14 5
Carriage to Glasgow, 354½ cwt. 9 as noted. D. F. B.....	13 5 11
	1,137 4

Jute under 30, 35%.
Oil cloth foundations, 40%.
Flax under 30, 35%.
Dek. flax under 30, 30%.
Burlaps 30%.

Approved.
Ounced.

W. A. DARLING, *Appraiser.*

21 *Extract of invoice per S. S. Victoria, Nov. 18th, 1872.*

	Ps.			Yds.			
72	28	1 bale 93 in. (10.40) Hessians.....	6 ps.....	904	*a* 8 *d*	30 2 8	Oil-cloth foundations, 40%.
	29	1 " Do.	6 "	912	.....	30 8 0	
	30	1 " 95 in. (10½.40) "	6	906½	8½ 12.20 sq. yd.	30 13 9	
	31	1 " 144 in. 12 oz. per sq. yard floor cloth.	2	305	4 *d*	20 6 8	

Approved.

WM. A. DARLING,
Appraiser.

Extract of invoice per S. S. "Erin," September 2nd, 1872.

			cwt. qr. lbs.				
15							
143	12	40 in., 7½, burlaps	10 2 6	2,430	2 8½–12	27 8 5	Burlaps, 30%.
144	12	" " "	10 1 6	2,430	.....	27 8 5	
145	12	" " "	10 1 10	2,429	.....	27 8 3	
1							
106	12	76 in., No. 8, burlaps	14 2 2	1,237	6½	31 11 5	Oil-cloth foundations, 40%.
107	12	" " "	14 1 22	124½	.....	31 13 7	
108	12	" " "	14 0 18	1,247	.....	31 16 6	
111	10	93 in., " "	13 2 14	1,002	7½	32 17 7	
112	10	" " "	13 2 22	1,010	.....	33 2 10	
113	10	95 in., " "	14 2 0	1,026½	8	34 4 4	
114	10	" " "	14 2 10	1,024½	.....	34 3	

Approved.

WM. A. DARLING,
Appraiser.

Extract of invoice per S. S. "Erin," January 2nd, 1873.

1							Oil-cloth foundations, 40%.
136	12	76 in., No. 8, burlaps	13 2 20	1,240	6½	31 12 11	
		* * * * * *	*	*	*	* * *	

Approved.

WM. A. DARLING,
Appraiser.

22 Samples of the imported goods having been exhibited which were made of jute, the plaintiffs introduced evidence to prove, and the defendants introduced no contradictory evidence, that the goods were called in commerce in this country "burlaps," and that there are not any goods known in commerce in this country as "oil-cloth foundations," which is not a commercial term, and not used until used in the tariff act. Floor-cloth canvas is made expressly for the manufacture of floor oil-cloth, is exclusively used for that purpose, and usually comes in widths of from six or eight yards. It has a harder twist, is a heavier and more expensive article than a burlaps, and is not calendered as burlaps are.

Burlaps are from 40 inches to 113 inches in width and are imported for various purposes, among others for the manufacture of oil-cloths. The usual widths are 40, 45, 47, 48, 58, 65, 76, and 95 inches. The oil-cloth manufacturers use burlaps of 40, 47, 58, 76, 93, 95, and 113 inches, not usually over 95 inches. Burlaps of between 40 and 75 inches in width are largely used for oil-cloths, but are more extensively used for other purposes. The general use of wide goods, that is to say,
23 from 75 to 113 inches wide, is in the manufacture of oil-cloths.

The Treasury Department decided, in the summer of 1872, that all burlaps of 76 inches in width and upwards were dutiable at 40 per cent., and all burlaps under 76 inches were dutiable at 30 per cent. Since that decision no goods are imported at 76 inches, but are imported of 75 and 75½ inches, and also of 96 inches. The burlaps which are the subject of controversy are not suitable for bagging for cotton, being too light, and are not so used commercially.

Floor-cloth canvas is a commercial term implying a well-known article of merchandise, thus described, and a merchant in speaking of foundation for oil-cloths would be considered to refer to floor-cloth canvas. Floor-cloth canvas is not called a burlaps, nor is a burlaps called floor-cloth canvas.

24 The foregoing comprise the substance of the plfts.' testimony and all thereof. The plaintiffs then rested. The deft. offered no testimony, and moved that the court direct a verdict for the deft. This motion the court denied, and deft.'s counsel then and there duly excepted. Deft.'s counsel then and there requested the court to charge the jury as follows, and to submit to the jury the matters of fact involved in such requests, and each of them, namely:

1. If the terms "oil-cloth foundations" and "floor-cloth canvass" can with reasonable commercial certainty signify two well-known articles of commerce, then such a meaning is consistent with the proper interpretation of the section.

2. If "floor-cloth canvas" is a commercial term, signifying a well-known merchantable commodity designated by that term, and "oil-cloth foundations" is not a commercial term, and there are no other articles than "floor-cloth canvas" and the wide burlaps that naturally and commercially speaking are or were in 1872 properly called "oil-cloth foundations," then the jury will determine from the testimony whether the articles imported by plffs. were or were not "oil-cloth foundations," and if they were, the deft. is entitled to a verdict.

25 3. If, in fact, the goods in controversy were "oil-cloth foundations," then it is immaterial whether they are or are not "burlaps," so long as there are found to be certain goods known as "burlaps" that are not, commercially and popularly speaking, "oil-cloth foundations."

4. If the goods are "oil-cloth foundations" the duty was correctly assessed, and plffs. cannot recover.

The court refused to charge in accordance with the said prayers, or any of them, and deft.'s counsel separately excepted to the refusal to charge each and every thereof, and also to the refusal to submit to the jury the case and the matters of fact in the said request stated. There being no disputed questions of fact, and the questions in the case being solely questions of law, the court then directed the jury to find a verdict for the plffs. and deft.'s counsel duly excepted to said direction. The jury thereupon found a verdict for the plffs. for the sum of $\$670\frac{10}{100}$, in gold coin, and $\$76\frac{94}{100}$ interest, in currency, and inasmuch as the aforesaid several matters of fact and of law do not appear by the judgment-record in this case, the said judge at the deft.'s request and at the

26 October term of the said court aforesaid, has signed and sealed this the bill of exceptions in this case.

[L. S.] N. SHIPMAN, *Judge.*

25 (Indorsed:) United States circuit court, southern district of New York. James P. Cummings et als. versus Chester A. Arthur. United States attorney's office, 41 Chambers street, New York. 187 . Copy. Bill of exceptions. Filed Oct. 27, 1875.

27 Supreme Court of the United States.

CHESTER A. ARTHUR, PLAINTIFF IN ERROR,
agst.
JAMES P. CUMMINGS, EDWARD HOWARD, Alexander Rhind, and Edwards W. Fiske, defendants in error.

Of October term in the year of our Lord one thousand eight hundred and seventy-five.

Afterwards, to wit, on the third Monday in said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Chester A. Arthur, by George Bliss, his attorney, and says, that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid, there is error in the several rulings of the court to which exception has been taken, and that by the record aforesaid, it appears that judgment aforesaid, in form aforesaid given, was given for the said defend-
28 ants against the said plaintiff. Whereas, by law of the land the said judgment ought to have been given for the said plaintiff in error against the said defendant in error, and the said plaintiff prays that the judgment aforesaid, for the errors aforsaid, and other errors in the record and proceedings aforesaid, as the same appear more fully therein, may be reversed, annulled, and altogether held for nothing, and that he, the plaintiff, may be restored to those things which he has lost by reason of said judgment.

GEORGE BLISS,
U. S. Atty., for Plff. in Error.

(Endorsed:) United States Supreme Court. Chester A. Arthur, plff. in error, vs. James P. Cummings et al., defts. in error. Assignment of error. George Bliss, U. S. atty., for plff. Filed Nov. 4, 1875.

29 U. S. Supreme Court.

CHESTER A. ARTHUR, PLAINTIFF IN ERROR,
agst.
JAMES P. CUMMING, EDWARD HOWAT, Alexander Rhind, and Edward W. Fiske, defendants in error.

I hereby admit due service for the above-named James P. Cumming, Edward Howat, Alexander Rhind, and Edward W Fiske, defendants in error, of the annexed writ of error and citation dated New York, Oct. 9, 1875.

GEO. S. SEDGWICK,
Atty. for James P. Cumming, Edward Howat, Alexander Rhind, & Edward Fiske, Defendants in Error.

(Endorsed:) Filed Oct. 9, 1875.

30 United States Supreme Court, to James P. Cumming, Edward Howat, Alexander Rhind, and Edward W. Fiske, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the third Monday of the October term of 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States

for the sourthern district of New York, wherein Chester A. Arthur is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York, the ninth day of October, 1875.

SAML. BLATCHFORD.

(Indorsement on cover:) No. 834. Chester A. Arthur, collector of the port of New York, plaintiff in error, vs. James P. Cumming, Edward Howat, Alexander Rhind, and Edward W. Fiske. S. New York. C. C. U. S. Filed 8th November, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

CHESTER A. ARTHUR, COLLECTOR, &C., PLAINTIFF IN ERROR,
vs.
JAMES P. CUMMINGS ET AL. } No. 834.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the Plaintiff in Error.

In the Supreme Court of the United States.

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vs.
JAMES P. CUMMINGS ET AL. } No. 834.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the plaintiff in error.

STATEMENT OF THE CASE.

This case is presented to obtain an authoritative exposition of this language of the act of June 6, 1872:

"SEC. 4. That on and after the first day of August, eighteen hundred and seventy-two, in lieu of the duties heretofore imposed by law on the articles mentioned in this section, there shall be levied, collected, and paid on the goods, wares, and merchandise in this section enumerated, imported from foreign countries, the following duties and rates of duty, that is to say: On all burlaps, and like manufactures of flax, jute, or hemp, or of which flax, jute, or hemp shall be the component material of

chief value, excepting such as may be suitable for bagging for cotton, thirty per centum ad valorem; on all *oil-cloth foundations or floor-cloth canvas*, made of flax, jute, or hemp, or of which flax, jute, or hemp shall be the component material of chief value, forty per centum ad valorem; on all bags, cotton-bags, and bagging, and all other like manufactures, not herein otherwise provided for, except bagging for cotton, composed wholly or in part of flax, hemp, jute, gunny-cloth, gunny-bags, or other material, forty per centum ad valorem." (17 Stats. at Large, 232.)

The question is, what (if any) meaning is to be given to the words "*oil-cloth foundations.*"

FACTS.

In the fall and winter of 1872–'73, the plaintiffs imported from Glasgow into New York certain goods manufactured at Dundee, Scotland, claimed by them to be "burlaps" simply, dutiable at 30 per cent. ad valorem, but upon which a duty of 40 per cent. was exacted by the plaintiff in error, then and now collector of the port of New York, upon the ground that they were "oil-cloth foundations" within the meaning of the act and section aforesaid; which duty was paid under protest, an appeal taken to the Secretary of the Treasury, who affirmed the collector's liquidation, whereupon the present proceedings were instituted.

These goods were of jute, and evidence was adduced by the importers to prove that they were called in commerce, *in this country*, "burlaps," and that there were not *any* goods known in commerce, *in this country*, as "oil-cloth foundations," which is not a commercial term, and not used until used in the tariff act. "Floor-cloth can-

vas" is made expressly for the manufacture of floor oil-cloth, is exclusively used for that purpose, and usually comes in widths of from six or eight yards. It has a harder twist, is a heavier and more expensive article than a burlap, and is not calendered as burlaps are. Burlaps are from 40 to 113 inches in width, and are imported for various purposes; among others, for the manufacture of oil-cloths. The *usual* widths are 40, 45, 47, 48, 58, 65, 76, and 95 inches. The oil-cloth manufacturers use burlaps of 40, 47, 58, 76, 93, 95, and 113 inches, not usually over 95 inches. Burlaps between 40 and 75 inches in width are largely used for oil-cloths, but also, and more extensively, for other purposes. The general use of burlaps from 75 to 113 inches in width is in the manufacture of oil-cloths. The Treasury Department decided in the summer of 1872, that all burlaps of 76 inches in width and upwards were dutiable at 40 per cent. ad valorem, and all burlaps under 76 inches wide at 30 per cent. The findings in this case state that, since that decision no goods are imported of 76 inches width, but are imported 75 and 75½ inches wide, and also of 96 inches. The invoices of the goods imported by the defendants in error, dated from September 2, 1872, to January 2, 1873, show some of just the width of 76 inches, and some narrower and some wider. The goods in question were not suitable for bagging for cotton, being too light, and were not so used commercially.

"Floor-cloth canvas" is a commercial term, implying a well-known article of merchandise thus described; and a merchant, in speaking of foundation for oil-cloths, would be considered to refer to floor-cloth canvas. Floor-cloth canvas is not called a burlaps, nor is a burlaps called floor-cloth canvas." (Record, 8, 9.)

The foregoing comprised the substance of the plaint-

iff's testimony and all thereof. The defence introduced none, but moved for a verdict for the defendants, which was denied, and the defendant excepted.

The defendant requested these instructions:

"1. If the terms 'oil-cloth foundation' and 'floor-cloth canvas' can with reasonable commercial certainty signify two well-known articles of commerce, then such a meaning is consistent with the proper interpretation of the section."

"2. If 'floor-cloth canvas' is a commercial term signifying a well-known merchantable commodity designated by that term, and 'oil-cloth foundation' is not a commercial term, and there are no other articles than 'floor-cloth canvas' and the burlaps that naturally and commercially speaking are, or were in 1872, properly called 'oil-cloth foundations,' then the jury will determine from the testimony whether the articles imported by the plaintiffs were or were not 'oil-cloth foundations;' and if they were, the defendant is entitled to a verdict."

"3. If in fact the goods in controversy were 'oil-cloth foundations,' then it is immaterial whether they are or are not burlaps, so long as there are found to be certain goods known as burlaps which are not, commercially and popularly speaking, 'oil-cloth foundations.'

"4. If the goods are oil-cloth foundations, the duty was correctly assessed, and the plaintiffs cannot recover."

The court refused to charge in accordance with the said prayers, or any of them, and the defendants excepted thereto, and to the refusal to submit the questions of facts to the jury.

There being no disputed question of fact, the court directed the jury to find for the plaintiffs, and the defendant excepted. (Record, 9, 10.)

ERRORS ASSIGNED.

The court erred in refusing to give the four instructions requested by the original defendant as above stated, and each of them; also in directing a verdict for the original plaintiffs.

A verdict for the original defendant should have been directed.

The cause should have been submitted to the jury without peremptory instructions to find for the original plaintiffs.

BRIEF.

The first dutiable article mentioned in the section to be construed is *burlaps*. The case gives no definition of this term, but Webster defines it as "a coarse cloth for baling, &c., made of *hemp*," and, in his Mechanical Dictionary, Knight says that "the canvas or backing of floor-cloth is a strong textile fabric of *hemp* or *flax*, known as *burlaps*." (2 Knight's Mech. Dict., 888.) That this article may now be made of *jute* we do not deny, but call attention to the fact that, until recently, the fiber of this plant was not used in making burlaps. I refer to the latest editions of the above dictionaries for this purpose. So in the seventh London edition of Dr. Ure's work, published in 1875, it is said that "floor-cloth manufacture has become of late years a very large branch of trade. The cloth is a strong and somewhat open *canvas*, woven of *flax*, with a little *hemp*," (no mention made of *jute*.) 2 Ure's Dict. of Arts., 461.

The case finds (Record, 8) that the goods in question were of *jute*, and that "they were called in commerce *in*

this country 'burlaps.'" The scientific authorities I have mentioned would indicate that they were *not* so known in England. It is well known that the material to which pigments are applied to make floor-cloth or oil-cloth is most extensively woven in Dundee, Scotland. These goods in dispute were ordered and imported from that place, and the terms in which an order transmitted to that country to be there filled was couched, so as to be understood by those to whom it was addressed, would seem to be as important as the designation in New York. We wish to apply these remarks to an assumption upon the part of the defendants in error that "floor-cloth canvas" and "oil-cloth foundations" are synonymous. The word "*canvas*" has an established meaning, as fixed and definite as is attached to "hat," "stove," or the designation of any other article in common use. Not only common knowledge, but a reference to the title "*jute*" in any of the encyclopedias or scientific dictionaries, informs us that *jute* cannot be made into *canvas*, because it will not bear exposure to moisture, and the fiber breaks if twisted. (In addition to Knight and Ure, see McCulloch's Commercial Dictionary.) Canvas is made in this country of cotton, and in Europe of hemp or flax, but nowhere of jute. For all purposes the latter is the inferior, cheaper substitute for the former. "Floor-cloth canvas," the case finds, (Record, 8,) "is made expressly for floor oil-cloth, has a harder twist, is a heavier and more expensive article than a burlaps, and is not calendered as burlaps are;" and the names are not interchangeable. Though the case does not expressly so state, we say it is quite apparent that the "floor-cloth canvas" is a manufacture of flax or hemp, with a twist which the jute fiber will not sustain without breaking, the harder

twist obviating the necessity for calendering the fabric. When jute was substituted for the more serviceable and expensive fibers in making the material upon which the stuffing and paints were to be placed to make oil-cloths, the inferior article was designated as "oil-cloth foundations," to distinguish it from the "floor-cloth canvas" made of hemp and flax; so that while the term "burlaps" may not now and in this country cover so finely-woven and closely-twisted a texture as floor-cloth canvas, it may and does cover the jute fabric *used* for oil-cloth foundations, whether technically known here by that or some other name. But though the word "burlaps" may embrace "oil-cloth foundations," so that they are all burlaps, all burlaps are far from being oil-cloth foundations. The latter is the *species* of the article of which the former is the *genus*.

The statement in the record (page 8) is "that there were not any goods known in commerce *in this country* as 'oil-cloth foundations,' which is not a commercial term, and not used till used in the tariff act," but it also appears that, while the narrower burlaps are used largely for making oil-cloth, but more extensively for other purposes, "*the general use*" of those above 75 inches is in the manufacture of oil-cloth. (Record, 8.) Therefore the Treasury Department sensibly decided that they must be considered as the article referred to by the expression "oil-cloth foundations," since they were *the material in fact used* in this country as the foundation in making oil-cloth, by whatsoever designation known. The statement is made that "a merchant, in speaking of foundation for oil-cloths," (not "oil-cloth foundations,") would be *considered* to refer to "floor-cloth canvas." But this is to be taken in connection with the *express*

finding that there were no such goods known in this country as "oil-cloth foundations," &c. If the witnesses testify that this was not a commercial term, nor one in use prior to the passage of this act, their statement as to what a merchant would have been understood to mean if he had used it is the merest conjectural opinion in the world. The testimony of merchants may be of value to show whether or not any article is known in commerce; and if so, by what designation; but if they say it is not known, that ends their capacity to state its meaning. One might as well undertake to interpret a language of which he had never even learned the alphabet, as for a witness to state the meaning of a term not known in his business and which was not in use.

As to terms which *are* in use and articles *known* to the commerce of the country, the commercial nomenclature of our own merchants is of essential importance in construing tariff acts; but if words are used and articles mentioned which have an actual existence, they are not to be entirely ignored because our importers have not become familiar with them. It is entirely and widely different from a case where a well-known article is imported under a given name, when the act is passed, but subsequently another material is made to subserve the same purpose—as gunny-cloth superseded cotton-bagging. Here the article designated by the term employed, and not its substitute, is that alone upon which the duty is assessable; but if the article *specially mentioned* exists when the act is passed, it is dutiable, whether known or unknown here by that particular designation when the act took effect. The usage of merchants is, perhaps, to be first resorted to; but if that utterly fails to afford any assistance, resort may and must be had to

other sources of information. (De Forest *v.* Lawrence, 13 Howard, 282; Roosevelt *v.* Maxwell, 3 Blatchf., 391.)

The aim is, in construing every instrument, whether it be a private writing or a public statute, to ascertain the *intention* of those by whom the language to be construed was employed. Or, as this court has expressed the familiar principle: "In construing statutes, it is not only our duty to give effect to *all the words* used *in their ordinary sense*, but to eviscerate, if possible, their true spirit and intent from all the connected circumstances, attendant or subsequent, as well as preceding." (Lawrence *v.* Allen, 7 Howard, 793, citing Bend *v.* Hoyt, 13 Peters, 273, and 1 Kent's Com., 461.) Words are to be taken in their ordinary sense. (Cruger *v.* Cruger, 5 Barb. Sup. Ct., 267; Opinion of the Justices, 7 Mass., 524.) If this means that they are, in tariff acts, to be taken in their ordinary sense as employed by commercial men, yet when it is proved that they have no special meaning among that class, or are wholly unknown among our own merchants, then we are remitted to other means of determining the effect to be given them; since it is another elementary and important rule of construction that "*no* word shall be deemed void or insignificant." Per Hornblower, C. J., James *v.* Dubois, 1 Harrison, (N. J.,) 293; Hutchins *v.* Niblo, 4 Blackf., 150; Opinion of the Justices, 22 Pick., 573, where it is said: "It is a sound rule of construction that *every clause and word* of a statute shall be presumed to have been intended to have some force and effect." 22 Pick., 573. And the intention, if obvious, is to be carried out, even if apt words have not been employed to express it with technical accuracy; "and such construction ought to be put upon it as does not suffer it to be eluded." (People *v.* Utica

Ins. Co., 15 Johns., 380, 381; Cooper *v.* Crane, 21 Wendall, 211.) The intention of the legislature is the primary object, to which all other ordinary rules of interpretation must be subordinated, in construing revenue or tax acts as well as any other. (United States *v.* Hodsdon, 10 Wallace, 395; Davy *v.* Morgan, 56 Barb., 218; Cornwall *v.* Todd, 38 Conn., 443.) "The great rule of construction is to ascertain what was the intention of those using the language to be gathered from the language used, *taken in connection with the subject-matter*, and having reference to *all* that is said upon the subject." (Catlin *v.* Hall, 21 Vermont, 157.) Failing to discover that "oil-cloth foundations" were known in commercial circles June 6, 1872, we can resort to the ordinary import of the words, remembering that, where technical knowledge fails, untutored "common sense is to be applied to the language used." (Rawson *v.* The State, 19 Conn., 299; Cruger *v.* Cruger, 5 Barb., Sup. Ct., 277.) If the term under discussion be a technical one, not known to commerce, we should resort to the art to which it relates for information. "In the enactment of laws, when terms of art or *peculiar phrases* are made use of, it must be supposed that the legislature have in view the *subject-matter* about which such terms or phrases are commonly employed." (Ex. p. Hall, 1 Pick., 261, 262.) We should look to the art for a comprehension of its terms, and to the place where it is carried on for a knowledge of what those terms are.

The subject-matter of this clause of the tariff act was the duty to be placed upon that material actually used as the foundation upon which those substances were placed which would make it oil-cloth, whatever its designation might be, provided it was of flax, jute, or hemp;

whether it was the "floor-cloth canvas" of hemp or flax, or the jute "oil-cloth foundations." Could there be any sense in imposing upon articles of the same material, designed for the same use, different rates of duty, by the same section of the statute?

It has been suggested that the section referred to imposes a duty upon all burlaps, &c., "excepting such as may be suitable for bagging for cotton," and that this exception being thus expressed excludes every other; so that if these goods are burlaps, they are only dutiable at thirty per cent. for whatever purpose imported. This begs the whole question. It is not necessary that the word "except," or "excepting," should be employed to take them out of the general clause; it is sufficient if they are taken out by a more specific designation or description, to which a different duty is attached; and the issue is whether or not this is the case. Thus the term "live animals" was held not to include *birds*, because a more specific description had previously been employed. (Reiche *v.* Smythe, 13 Wallace, 162, citing Homer *v.* The Collector, 1 Wallace, 486, and Brewer *v.* Blougher, 14 Peters, 178, *q. v.*)

The term "floor-cloth canvas" was proved to be a commercial term, describing a well-known article entirely different from the present importation, while "oil-cloth foundations" designated no other particular commodity than these goods in question, unless it included with these all such as were in fact used for the foundation in making oil-cloths; but these wide burlaps were the article in general use, and must be deemed that to which the words were specially applicable. The testimony showed nothing else to which these words could apply,

and that they were perfectly appropriate to designate this kind of burlaps thus used.

The true construction of the section, then, would be, 1. "Burlaps;" all burlaps except those used for bagging for cotton and those which as a commercial article are generally used as "oil-cloth foundations." 2. "Oil-cloth foundations;" wide burlaps and any other goods (if any such there be,) not floor-cloth canvas, which as a commercial article are recognized as adapted to the use of foundations for oil-cloths and no other general uses. 3. "Floor-cloth canvas;" a special kind of goods made for a foundation for oil-cloths, differing in make, weight and value from burlaps and all other foundations for oil-cloth, and always identified and known by its special appropriate name.

Upon the state of facts disclosed by the record, the instructions requested were applicable and proper, and should have been given. At all events, it was the duty of the court to submit all the evidence to the jury to pass upon the meaning, commercially or otherwise, of these tariff terms, and the applicability of one or the other of them to the goods in question.

At least, it was not within the province of the court to determine, as matter of *law*, that these wide burlaps were *not* "oil-cloth foundations," when there was evidence to show that their general use was in fact as foundations for oil-cloth, and that "oil-cloth foundations" was not a commercial description.

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In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1875.

CHESTER A. ARTHUR,
Plff. in Error,

vs.

JAMES P. CUMMING ET ALS.,
Defts. in Error.

No. 834.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT.

BRIEF FOR DEFENDANTS IN ERROR.

The Act of June 6th, 1872, section 4, provides as follows:

"On all burlaps and like manufactures of flax, jute or hemp, or of which flax, jute or hemp shall be the component material of chief value, excepting such as

may be suitable for bagging for cotton, 30 per centum *ad valorem.*

"On all oil-cloth foundations or floor-cloth canvas made of flax, jute or hemp, or of which flax, jute or hemp shall be the component material of chief value, 40 per centum *ad valorem*, &c., &c."

The case shows that the article imported by the defendants in error is and was known in trade and commerce in this country as "Burlaps" and nothing else, and that said article is never known as oil-cloth foundation or floor-cloth canvas. The case also shows that an article similar to the defendants' importations is used in the manufacture of oil-cloths in all its widths as well as for many other purposes; that an article manufactured of jute, but differing in the manner of its manufacture, was used solely in the manufacture of oil or floor cloths, and was known in trade and commerce as "*floor-cloth canvas.*"

It further appears from the case that "a merchant in speaking of *foundations for oil-cloths* would be understood to refer to *floor-cloth canvas. Floor-cloth canvas* is not called a *burlap* nor is *burlap* called *floor-cloth canvas.*" (See case.)

There was no conflicting testimony, and no evidence tending to show that the importations of burlaps in question were in fact used as foundations for oil-cloth.

Points for Defendants in Error.

I.

It is too well settled to require the citation of authorities that, using the language of Justice Thompson in Elliott *v.* Swartwout, 10 Pet., 137–151:

"Laws imposing duties on importations of goods, are intended for practical use and application by men

engaged in commerce, and hence it has become a settled rule in the interpretation of statutes of this description to construe the language adopted by the Legislature, and particularly in the denomination of articles according to the commercial understanding of the terms used. The object of the duty laws is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. Whether a particular article was designated by one name or another, in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the Legislature. It applied its attention to the description of articles as they derived their appellations in our markets, in our domestic as well as our foreign traffic, and it would have been as dangerous as useless to attempt any other classification than that derived from the actual business of human life."

This rule of construction applied to the present case is decisive, because it appears uncontradictedly that the goods imported by the defendants in error were "burlaps," and the statute imposes a duty on "*all burlaps*," with a single exception, which exception was negatived upon the trial. Now being known commercially as "burlaps," and nothing else, they cannot be assumed by the court to be embraced in some other term used in the tariff laws. To sustain the construction contended for by the government would violate this principle of construction, a principle so firmly established that the courts have come to consider it as *never* to be departed from, except in cases where Congress has *clearly and unequivocally* designated another method of construction.

See Curtis *vs.* Martin, 3 How., 106.

It may be observed here that the same rule of construction must apply to the words "oil-cloth foundations or floor-cloth canvas." The article dutiable under the above designation must be an article so

known in trade and commerce. There is not the slightest suggestion upon the evidence that the article imported here was so known; on the contrary, the record states the testimony on this point as follows:

"Floor-cloth canvas is a commercial term, implying a well-known article of merchandise, thus described, and a merchant in speaking of foundation for oil-cloths, would be considered to refer to floor-cloth canvas. Floor-cloth canvas is not called a burlap, nor is a burlap called floor-cloth canvas."

II.

The defendants in error having introduced evidence tending to show the article imported by them to have been "burlaps," were entitled to a verdict, so long as no evidence was offered tending to contradict such testimony.

Evidence that similar burlaps were sometimes or often used as foundations for oil-cloth had no such tendency.

To illustrate: The statute imposes a duty on shawls, and also on blankets *eo nomine*. Could an importation shown to be a blanket be rendered dutiable as a shawl, by reason of evidence showing that the purchaser, instead of using it for a blanket, had applied it to the uses of a shawl; or by general testimony that blankets were sometimes used by some people in the place of shawls?

III.

The terms "oil-cloth foundation or floor-cloth canvas" are used synonomously and as explanatory of each other.

The intention of Congress is manifest to use the terms in their commercial sense. Now, the evidence shows that "floor-cloth canvas" is the correct trade term, but that the other, or its equivalent foundation for oil-cloths, means the same thing.

The two terms were used out of abundant caution to designate one article. Such a method is a very common one in tariff legislation—of sufficiently frequent occurrence to qualify the rule of interpretation invoked by the Government, that "no word shall be deemed void or insignificant."

We do not require these words to be stricken out, and we are aware of no rule of interpretation forbidding the use of tautological expressions.

We cite the following illustrations of the use in tariff acts of convertible terms in describing the same article from title XXXIII of the Revised Statutes:

Sail duck or canvas for sails, Schedule E, page 466.

Argentine, Alabatta or German silver, Schedule E, page 470.

Indian corn or maize, preserved or condensed milk, Schedule F., page 471.

Bay rum or bay water, Schedule M, page 477.

Slack coal or culm, Ib., p. 478.

Fusel oil or amylic alcohol, Ib., p. 479.

Gum substitute or burnt starch, Ib., p. 480.

Linseed or flaxseed, Ib., p. 481.

Vitriol, white or sulphate of zinc, Ib., p. 485.

Balsam fir or Canada, Ib., p. 486.

Cocoa or cacao,

Conium cicuta or hemlock,

Cow or kine pox or vaccine virus,

Diamond dust or vort,

Esparto or Spanish grass,

Ib., page 488.

Istle or Tampico fibre, Ib., p. 489.

Plaster of paris or sulphate of lime, Ib., p. 491.

Squills or sills, Ib., p. 492.

Many more might be gathered from earlier acts.

Compare with *McCulloch's* and *McElrath's Commercial Dictionaries.*

So here is oil-cloth foundations *or* floor-cloth canvas.

By this construction *or* is used in its usual and natural signification, where the same thing is referred to by different descriptions or designations. And to this effect, as before suggested, was the testimony as to the mercantile understanding of the two terms.

IV.

The act imposes a duty of thirty per cent. upon *all Burlaps* EXCEPTING such as may be suitable for bagging for cotton.

When a general proposition is stated and a single exception is named, no other exception is admissible if the act will bear any other construction. *Expressio unius est exclusio alterius.*—Broom's Maxims. *Expressum facit cessare tacitum.—Ib.*

We have seen that the act will bear a reasonable and ordinary construction without forcing into it the new exception upon the basis of which the collector assessed the duty complained of. Had Congress intended to have made any snch exception it would inevitably and naturally have stated it *as an exception, e. g.:*

On all burlaps, excepting such as may be suitable for bagging, &c., *and* excepting such as may be suitable for foundations for oil-cloths, 30 per cent., &c., &c.

Can it be said that Congress intended to introduce such a dubious and artificial execption as the Govern-

ment contends for, when, naturally and logically, it would have followed after and in the same manner with the other exception.

In other words, is there any manifestation of an intent to make the use the criterion of dutiable classification, as there is in respect to the bagging; and see Curtis *v.* Martin, 3 How., 106.

V.

The plaintiff in error would strike out the word "*or*" and insert the word "*and.*"

This can *never* be done "except for strong reasons and in conformity with a clear intention of the Legislature."

Here, assuredly, no strong reason can be given for such a violent change in the natural construction of the statute. Remembering this elementary principle of construction and supplementing it with the equally well settled rule: That duties are never imposed upon the citizen upon strained or doubtful constructions, and that revenue statutes are to be construed most favorably for the importers—it seems clear that the construction sought to be applied by the Government cannot be upheld.

Adams *vs.* Bancroft, 3 Sumn., 384.
U. S. *vs.* Wigglesworth, 2 Story C. C., 251.
See also Sedgwick on Statutes, 260, 261.

VI.

The Government's construction strikes out the important word "all" before the word "burlaps." The fact that *some* burlaps are still admitted at 30 per cent. duty is simply an arbitrary exercise of discretion on the part of the collector. Why some burlaps used for oil-cloth foundations (and all burlaps may be and sometimes are so used) should pay 30 and some 40 per cent., is a mystery we cannot undertake to solve.

Nor can we see why a burlap 75 inches wide, in fact, imported by an oil-cloth manufacturer and used by him as a foundation for oil-cloth, should be assessed thirty per cent., while a burlap 76 inches wide, imported by an upholsterer and used in his business, should be assessed forty per cent. It is certainly a distinction not found in the text of the statute.

VII.

It will be observed, on reference to the various acts under which duties have been imposed upon this article and floor-cloth canvas, that the term *canvas* alone is always used.

Vide sec. 14, Act March 2d, 1861.
" " 10, " July 14th, 1862.
" " 7, " June 30th, 1864.

"Burlaps" is also used.

The term *floor-cloth* canvas was never used except in the present act. The term *oil-cloth* foundation was never used. "Burlaps" was constantly used. When the term *floor-cloth canvas* was at last used to designate a particular kind of canvas from all other canvas, Congress saw fit to explain the term, which was entirely new, by the words *oil-cloth foundations*, that being the PURPOSE and the only purpose for which that kind

of canvas was made, as was well understood in trade. In this simple, natural, rational view of the law, what necessity for ingenious and forced interpretations to make an act say something which it does not say and leave unsaid what it does say.

VIII.

There was no error in the refusal to give the four instructions prayed for. There was no testimony competent to be considered upon which such instructions could be founded.

The first was entirely hypothetical. There was no evidence tending to show that "oil-cloth foundations" and "floor-cloth canvas" were different things.

So of the second; and as framed, it was calculated to entirely mislead a jury.

The third is a pure question of law, with which the jury could have had nothing to do.

The fourth was properly refused, because there was no evidence in the case tending to show the goods to be "oil-cloth foundations."

The uncontradicted testimony was, that if a person desiring to purchase goods came to the stores of the witnesses and asked to see some *oil-cloth foundations*, the witnesses would suppose him to mean floor-cloth canvas, and would show him floor-cloth canvas. That a *burlap* is always a *burlap*, and *floor-cloth canvas* is always *floor-cloth canvas*.

IX.

There was no controverted question of fact to be

submitted to the jury, and as the exception was only to the refusal to submit the matters of fact involved in the four requests before referred to, the general assignment of error that the cause should have been submitted without peremptory instructions is not tenable. No such broad exception was taken. Both parties moved the court to direct a verdict according to the conclusions arrived at upon the undisputed and uncontradicted facts in the case. The motion of the original defendant being overruled, he asked to have certain specific instructions given the jury; and that the questions of fact involved therein be submitted. If there was no error in refusing those instructions, then the mere fact of not submitting the case without peremptory instructions was not error, and cannot be now assigned.

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